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The Duty to Criticize the Courts (II)

Roger J. Miner '56

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Miner '56, Roger J., "The Duty to Criticize the Courts (II)" (1986). *Judges*. 1.
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Roger J. Miner
U.S. Circuit Judge
Second Circuit Court of Appeals

Georgetown University Law Center
The Federalist Society
February 20, 1986

In observing the work of lawyers in the courts in which I have served and in other courts, I have generally been impressed with the service that the bar has rendered in the representation of clients. I have not been quite so impressed, however, with the performance of the bar in the discharge of its duty to society as a whole. It is the willingness to accept this public responsibility function that distinguishes the bar as a profession. The value of the calling is diminished to the extent that any one lawyer shirks his or her professional obligation of service to the community.

There are many duties implicated in the concept of public responsibility -- the duty to undertake the representation of indigent clients without charge (if more lawyers performed this duty, perhaps the public expense for such representation could be greatly reduced or eliminated); the duty to see that able and honest men and women are appointed and elected as judges; the duty to aid in the improvement of legal education; the duty to maintain the competence and integrity of the bar, and to disclose

violations of the rules of professional conduct; the duty to set an example and maintain public confidence by avoiding even minor violations of law; the duty to seek legislative and administrative changes to improve the law and the legal system; and the duty to educate the public and to protect it from the unauthorized practice of law.

Another duty, and the one upon which I intend to focus my remarks tonight, is the duty to criticize the courts. It is my premise that informed criticism of the courts and their decisions is not merely a right but an ethical obligation imposed upon every member of the bar. I also hold that judges should not respond to such criticism, and in fact should never express any extra-judicial opinion regarding legal or constitutional issues that may come before the courts.

There is a Canon in the Code of Professional Responsibility that instructs lawyers to assist in improving the legal system. The Ethical Considerations relating to that Canon observe that lawyers are especially qualified to recognize deficiencies in the system and to initiate corrective measures. They encourage the legal profession to support changes in the law when existing rules eventuate in unjust results. The Preamble to the new Model Rules of Professional Conduct adopted by the American Bar Association urges that lawyers should employ their knowledge to reform the law. In my opinion these admonitions speak to a duty

on the part of lawyers to identify and discuss incorrect actions by the courts, subject only to the requirement that the criticism be impelled by a good-faith desire for improvement in the law and the legal system.

I do not speak here of malicious or false statements about a judge or of disruptive or contemptuous conduct in the courtroom. These never can be countenanced, and I have kept with me for nearly thirty years a case I read in law school regarding a penalty imposed for behavior of this type. The decision is taken from the ancient English Reports and is one of those collected by Sir James Dyar, sometime Chief Justice of Common Pleas. It is reported as follows: "RICHARDSON, Chief Justice of C.B. at the assizes at Salisbury in the summer of 1631 was assaulted by a prisoner condemned there for felony, who after his condemnation threw a brick bat at the said Judge, which narrowly missed; and for this an indictment was immediately drawn . . . against the prisoner, and his right hand cut off and fixed to the gibbet, upon which he was himself immediately hanged in the presence of the Court." It seems to me that the judge overreacted somewhat in spite of the provocation. Of course, there are those who today would consider tossing a brick to be "protected expression." I do realize that it sometimes is necessary for a lawyer to bite his or her tongue when in the presence of some particularly arbitrary tyrant in a black robe. My father, who has been

practicing law for sixty years, holds in the highest regard the lawyer who made some intemperate remark during a long and heated argument with a judge. When the judge shouted: "Counsellor, you have been showing your contempt of this court," the lawyer responded: "No, your honor, I have been trying to conceal it."

While lawyers generally feel free to criticize the state of the law in relation to rules of court, statutes and even the Constitution itself, there is a noticeable reluctance to criticize judge-made law, specific judicial decisions or individual judges. Yet, the public responsibility function of the bar is just as implicated in the latter as in the former. Why the distinction? I think that the answer lies in the unfortunate, but well-grounded, fear that affronts to tender judicial sensibilities may result in unnecessary antagonisms, disciplinary action or worse. For example, in 1830, Judge James H. Peck of the United States District Court for the District of Missouri disbarred and imprisoned a lawyer for publishing a letter critical of one of his decisions. Although this disgraceful episode led to an impeachment proceeding and caused Congress to curtail the summary contempt power of the federal courts, echoes of the Peck case were heard in a decision handed down by the Supreme Court at its last term. The decision reversed a six-month suspension from federal practice imposed upon Robert J. Snyder by the Eighth Circuit Court of Appeals for

conduct said to be prejudicial to the administration of justice and unbecoming a member of the bar. Snyder's difficulties stemmed from a letter he wrote to the United States District Court for the District of North Dakota. The letter was written after the circuit court had twice returned his Criminal Justice Act fee application for insufficient documentation. In his correspondence, Snyder refused to provide further information, generally criticized the inadequacy of the fees authorized in similar cases, expressed his disgust at the treatment afforded to him by the circuit and directed that his name be removed from the list of attorneys available for criminal defense assignments. The district court judge, finding nothing offensive in the letter, and perceiving some merit in Snyder's criticisms, passed the letter on to the circuit. A three-judge panel of the circuit ultimately found that the statement, which Snyder refused to retract, was disrespectful, contentious and beyond the bounds of proper comment and criticism.

In reversing the panel decision, Chief Justice Burger wrote: "We do not consider a lawyer's criticism of the administration of the [Criminal Justice] Act or criticism of inequities in assignments under the Act as cause for discipline or suspension. . . . Officers of the court may appropriately express criticism on such matters." The Chief Justice observed that the circuit court had acknowledged the meritorious nature of Snyder's

criticism and, as a result, had instituted a study of the administration of the Criminal Justice Act. In light of that observation, I believe that the Chief Justice missed an excellent opportunity to comment on the attorney's duty to criticize the courts and the beneficial purposes served by the performance of that duty. Snyder's actions were well within the bounds of the public responsibility he assumed when he became a member of the bar. This is so because a lawyer is obliged not only to educate the public about the law, the legal system and the judges but to inform the courts as well.

Justice Jackson once wrote that "criticism by the profession is one of the most important criteria in appraising a decision's real weight in subsequent cases." Justice Brewer said: "It is a mistake to suppose that the Supreme Court is either honored or helped by being spoken of as beyond criticism. On the contrary, the life and character of its justices should be the objects of constant watchfulness by all, and its judgments subject to the freest criticism." "I have no patience," said Chief Justice Harlan F. Stone, "with the complaint that criticism of judicial action involves any lack of respect for the courts. When the courts deal, as ours do, with great public questions, the only protection against unwise decisions and even judicial usurpation, is careful scrutiny of their action and fearless comment upon it."

And so it is that when the Attorney General of the United States publicly criticizes certain decisions of the Supreme Court, as he has done in recent months, he is acting in the highest traditions of the legal profession. By leading serious discussions of constitutional doctrine important to the citizenry and to the courts, he performs the public service encouraged by Justices Jackson, Brewer and Stone. It ill behooves members of the bar to ridicule and abuse a fellow member of the profession for fostering the robust and uninhibited debate that is the hallmark of a free society. When Stephen A. Douglas denounced Abraham Lincoln for questioning the validity of the infamous Dred Scott decision, Lincoln replied as follows: "We believe as much as [Mr.] Douglas (perhaps more) in obedience to and respect for the judicial department of government. We think its decisions on constitutional questions, when fully settled, should control not only the particular case decided, but the general policy of the country, subject to be disturbed only by amendments of the Constitution, as provided in that instrument itself. More than this would be revolution. But we think the Dred Scott decision is erroneous. We know the court that made it has often overrruled its own decisions, and we shall do what we can to have it overrule this." Lincoln was a great lawyer who well understood the public responsibility of the bar.

It has never been the place of a judge, however, to respond to specific criticism, and I think that it is unseemly for Justices of the Supreme Court to engage in public argument with the Attorney General or any other lawyer for the purpose of defending the position of the Court on one issue or another. Such discourse not only detracts from the dignity of the court but also communicates an unwillingness to maintain the openness of mind so essential for the proper performance of the judicial role. When the judiciary undertakes a point-by-point defense of criticism leveled by members of the bar, it discourages what it should encourage and protect. Even in the case of unfair and unjust criticism, the bench must remain silent, leaving to the bar its ethical obligation to come to the defense of the judiciary in such situations.

The judiciary should assure the bar that critical comments of all kinds are welcomed. It should heed the message of Justice Frankfurter that "judges must be kept mindful of their limitations and of their ultimate public responsibility by a vigorous stream of criticism expressed with candor however blunt." The Justices of the Supreme Court and of every other court in the land must recognize, as did Frankfurter, that lawyers "are under a special responsibility to exercise fearlessness" in criticizing the courts. When Justice Brennan wrote in the Sawyer case that

"lawyers are free to criticise the state of the law," he reserved no rebuttal time for the judiciary.

I believe that judges generally are too free in giving their out-of-court opinions on matters that may eventually be put before them for decision. Several years ago, a colleague of mine who has served for many years on the Second Circuit Court of Appeals wrote a piece for the New York Times entitled "Judges Must Speak Out." Ever since I read that essay, I have been contemplating a companion piece entitled: "Judges Must Shut Up."

It has long been accepted that no judge should become committed on any issue of fact or law until that issue is properly presented to the judge in the course of an actual case or controversy. The rule is a simple but salutary one. It communicates to those on either side of an issue that a logical and well-constructed argument might carry the day in persuading an impartial court to a desired conclusion. It communicates that the judge has no fixed agenda and is receptive to new ideas and approaches (and even to old ideas and approaches) on a case-by-case basis. It lends confidence to those with actual disputes to be resolved, and it reinforces the beneficial rule set down by Francis Bacon in his essay "Of Judicature": "Judges ought to remember that their office is jus dicere and not jus dare; to interpret law, and not to make law, or give law."

In the same essay, Bacon said: "An overspeaking judge is no well-tuned cymbal." Unfortunately, many of these poorly tuned instruments continue to play, rendering decisions and giving opinions when they are not officially asked to do so and consequently disturbing the confidence necessary for the effective operation of the judiciary. Let me hasten to add that there are numerous matters upon which judges can and should be heard -- matters affecting administration of the legal system, procedural rules and ethical standards. A judge also should teach and write about the law in an expository way, pointing to trends and changes in decisions already written and in legislation already adopted. A judge should encourage debate about controversial constitutional and legal issues without participating in the debate. I have lectured and written about the public accountability of judges -- the need for judges to report to the citizenry about developments in the law and the legal system. In all these activities, however, opinions must be avoided. Such opinions manifest the disease of judicial activism in one of its most virulent forms. Lawyers, law professors and law students must be the advocates, debaters and opinion molders. As for judges -- even those former academics who find it so difficult to doff the academic gown -- by their official decisions alone must they be known.

I have enjoyed being with you tonight and meeting so many bright young law students. In light of the upcoming bicentennial of the Constitution, the objectives of your organization take on a special significance. I believe that your interest in an historical examination of the sources, meaning and intentions behind our great Charter is very much in order, although others say that such an undertaking has little relevance to modern law and society. To my mind, a concern for the principles of federalism and the separation of powers is not linked to any one political party or philosophy. As you all know, the federal judiciary was conceived of as the least dangerous branch, the weakest of the three departments of power, limited to an interpretive function, with no influence over the sword or purse. When the judiciary oversteps its constitutional bounds, it merits censure from the bar, and court decisions that are not guided by constitutional principles likewise deserve condemnation. Remember always that where there is temperate criticism of the courts for constructive and positive purposes, grounded in good faith and reason, the judiciary is strengthened, the rule of law is reinforced and the public duty of the bar is performed.

Since this is an institution of higher learning, I close with a final examination. I'll give you a quotation and you tell me the name of the author. Here's the quotation: "The Court . . . has improperly set itself up as . . . a superlegislature . . .

reading into the Constitution words and implications which are not there, and which were never intended to be there. . . . We want a Supreme Court which will do justice under the Constitution -- not over it." The name of the author is -- Franklin D. Roosevelt.

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doctrine is evidence that the event was caused by an instrumentality exclusively in the control of Rapid Industrial Plastics Co., Inc. (see, *Corcoran v. Banner Super Market*, 19 NY2d 425). Evidence identifying the property as belonging to respondent at an earlier point in time can hardly substitute for proof of sole control. It is axiomatic that "without proof of control, an essential predicate for the application of the doctrine of *res ipsa loquitur* was absent" (see, *Interested Underwriters at Lloyds v. Associated Ceilings Corp.*, 55 NY2d 635, 637). As Rapid Industrial aptly notes, to infer from its mere receipt of a tire on one date that it exercised exclusive control at some later date would require an impermissible series of inferences. This mode of reasoning is "almost classic in heaping inference upon inference to achieve a desired result" (*Zellman v. Metropolitan Transp. Auth.*, 83 AD2d 144, 150 [concurring opn of Gulotta, J.]).

Inasmuch as a reasonable view of the evidence does not support defendant Rapid Industrial's sole control of the instrumentality which caused the harm, application of *res ipsa loquitur* is inappropriate and dismissal is warranted.

Federalist Society Forms New York Chapter

A recently formed metropolitan New York chapter of the Federalist Society, a group of attorneys and judges dedicated to what is described as a constructive approach to law and government, will have a Federal appeals court judge as its featured speaker next month at its first formal function.

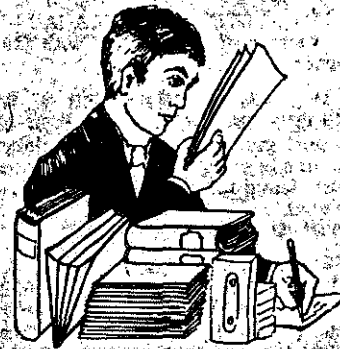
Scheduled to speak Feb. 13 at the Grand Hyatt Hotel will be Judge Ralph K. Winter of the U.S. Court of Appeals for the Second Circuit. His talk at 6 P.M. in the Alvin Room, which is open to the bar and bench, will deal with "The Growth of Judicial Power."

According to Michael Weinberger, president of the local chapter, membership is open to lawyers, judges and law students "who support the principles of limited government and the careful separation of governmental powers." The organization, he said, has more than forty chapters around the country.

Directors of the local unit are Dennis G. Jacobs and Thomas H. Bell of Simpson, Thatcher & Bartlett, Kaj Ahlburg of Shearman & Sterling and Michael E. Rosman of Rosenman Colin Freund Lewis & Cohen.

Additional information may be obtained from the Federalist Society, 80 Wall Street, Suite 1015, New York, N.Y. 10005.

SETTLEMENT



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Cranch) 267 (1806), a court does not have diversity jurisdiction over a suit by a plaintiff against a partnership in which any partner's citizenship is identical to that of the plaintiff."

Judge Lasker, therefore, dismissed the complaint finding that a number of partners of defendant Solomon Brothers were, like plaintiff, citizens of New Jersey. He rejected an argument that the non-diverse partners be dropped under Rule 19(b) as "non-indispensable." He also rejected an argument that partnerships in disso-

lack of diversity between the plaintiff and some of the defendant partners."

Permissive Counterclaims

Nadja de Magalhaes Spencer v. Banco Real, S.A., et al.," decided by Judge Kram on Dec. 10, underscored the need for an independent jurisdictional basis for permissive counterclaims. In this case, originally brought as a Title VII action, Judge Kram dismissed a counterclaim which she found to be permissive rather than compulsory for lack of independent jurisdictional grounds.

against an opposing party. Such unrelated counterclaims are referred to as permissive, since a party need not plead them, but instead may bring a separate action on the claim in the forum of his own choosing. *Harris*, 571 F. 2d at 121-22. However, if a permissive counterclaim is raised in a federal district court, an independent jurisdictional ground must exist."

Failure to follow the local Southern and Eastern District rule governing interpleader motions resulted in the denial of leave to file a third-party

Continued on page 7, column 1



J. MADISON

NYLS 2/5/86

THE FEDERALIST SOCIETY PRESENTS:



J. MADISON

JUDGE RALPH K. WINTER, United States Court of Appeals, Second Circuit

speaking on

"THE GROWTH OF JUDICIAL POWER"

A wine and cheese reception will precede Judge Winter's speech. Attendees will have an opportunity to ask questions, and meet officials of the Federalist Society. This event is open to the public; there is no attendance fee.

The Federalist Society is composed of judges, lawyers and law students (as well as lay members) who support the principles of limited government, and careful separation of governmental powers. Speakers at past Federalist Society events have included Chief Justice Burger, Justice Rehnquist, Professor Emeritus Raoul Berger of the Harvard Law School, Professor Richard Epstein of the University of Chicago Law School, and others. Information concerning the Society can be obtained by calling (202) 822-8138; or by writing to the New York Chapter at 80 Wall Street, Suite 1015, N.Y., N.Y. 10005.

DATE and TIME: FEBRUARY 13th, 6:00 P.M.
PLACE: HYATT HOTEL, Alvin Room, Conference Level
(THE HYATT HOTEL IS NEXT TO GRAND CENTRAL STATION)